EXXON CO., U.S.A.

IBLA 91-177 Decided November 9, 1993

Appeal from a decision of the Director, Minerals Management Service, that denied an exception to royalty regulation 30 CFR 206.106 (1986).

Affirmed.

1. Oil and Gas Leases: Royalties: Generally--Oil and Gas Leases: Royalties: Processing Allowance

   Regulations issued in 1986 limited an allowance for processing costs incurred by oil and gas royalty payors for gas produced during 1987 to two-thirds of the value of the product. Such lessees were not entitled to the benefit of later promulgated regulations providing a greater production allowance that applied only to production beginning on March 1, 1988.

APPEARANCES: Scott Lansdown, Esq., Midland, Texas, for appellant; Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Exxon Company, U.S.A. has appealed from a December 4, 1990, decision of the Director, Minerals Management Service (MMS) that denied an application by Exxon for an increased allowance for purposes of calculating royalty on Exxon's production from Carter Creek Gas Plant (owned by Chevron, U.S.A.) during 1987. The December 1990 decision found that 30 CFR 206.106 (1986) "limits [royalty] deduction for the cost of processing to two-thirds of the value of the extracted natural gas liquids" (Decision at 2). Referring to the regulation as "the two-thirds limitation," the Director refused to apply amended regulations issued in 1988 to the Exxon application that would have permitted consideration of an increased allowance, finding that MMS lacked authority to do so (Decision at 4, 5).

Exxon's statement of reasons (SOR) raises three contentions on appeal: first, that Federal royalty regulations are designed "to ensure that the government receives the value of the production at the lease;" second, that actual costs should be used when factoring the production allowance, and third, that the regulations governing such calculations permitted MMS to

exercise discretion in this case when setting the allowance for processing so as to exceed the two-thirds limitation. It is argued by Exxon that the Director ignored some of the arguments advanced in support of these contentions when he issued his December 1990 decision (notably arguments based on historical analysis of Federal royalty regulations that tend to show application of the two-thirds limitation is contrary to historic policy) (SOR at 4). Exxon also argues that the Director misconstrued arguments tending to show that allowance of actual costs to a payor is favored in
this case, where "Exxon has consistently made efforts to ensure that the processing fee is kept as low as possible" (SOR at 1, 4). Exxon argues
that even under the 1986 regulations applied by MMS consideration of "other relevant matters" permitted deviation from the two-thirds limitation, but that regulations effective in 1988 conclusively established that MMS may,
in a proper case, approve a processing allowance that exceeds the two-thirds limitation imposed by CFR 206.106 (1986). In support of this last argument, Exxon cites Forest Oil Corp., 107 IBLA 1, 3 (1989). The Exxon application for consideration of an increased allowance under the new rule was made in 1989, at a time when the 1988 amendment was in effect.

In answer to Exxon, MMS takes the position that Kerr-McGee Corp., 106 IBLA 72 (1988) is controlling here, and that the issue before us is "whether MMS is required to accept [Exxon's] gross proceeds as royalty value for the wet gas produced from the Federal lease" (Attachment to MMS Answer at 3). Arguing that 30 CFR 206.106 (1986) provided "a maximum two-thirds manufacturing allowance," MMS contends that application of the cited rule "is binding upon all Departmental officials * * * and may not be waived." Concerning Exxon's attempt to invoke the 1988 regulations in support of the application for an increased allowance, MMS comments that those regulations were not in effect "at the time relevant to this dispute" (Answer at 1).

In Kerr-McGee Corp., 125 IBLA 279 (1993), we rejected arguments similar to the first two contentions made by Exxon in this appeal concerning consistency of application by the Department of rules and policy governing production allowances. Therein, we found that "regardless of the consistency of the application of the rule" concerning royalty computation for products extracted from gas under rules promulgated prior to 1988, cited decisions
of the Court of Appeals had established the royalty regulation "itself contained no limitation on its application." Id. at 285. From this finding, we concluded the two-thirds limitation was a valid rule that was properly applied to the royalty payor. Id. at 286, n.4. That decision is controlling here insofar as concerns Exxon's arguments based on historical development of royalty rules and past Departmental policy governing production allowances. Nonetheless, the refusal by MMS to apply later promulgated rules respecting allowances for processing is a matter separate and apart from those issues that remains to be considered.

When the MMS staff considered Exxon's request to apply the 1988 rule (30 CFR 206.158(c)(3) (1989)) to 1987 production from the Carter Plant,

they reported that "[t]here has not been a decision under the old regulations granting an exception to the 66-2/3 percent limitation on liquids." MMS Memorandum dated June 7, 1990. The cited memorandum pointed out that the production at issue occurred from January 1 through December 31, 1987. The Director, apparently relying on the June 7 memorandum, found that "Exxon's reliance on current regulations is misplaced since such regulations by their terms did not become effective until March 1, 1988" (Decision at 4). The issue in this appeal is therefore whether the 1988 rule may properly be applied to the Exxon application for increased allowance for 1987 production. We find that it cannot.

This Board has previously opined that newly promulgated rules may, in certain instances, be applied without limitation to all pending cases in the absence of intervening rights or prejudice to the interests of the United States. See, e.g., Conoco, Inc., 115 IBLA 105 (1990). Unlike the rule-making addressed in Conoco, however, the 1988 royalty regulations were specifically made to apply "prospectively to gas production on or after [Mar. 1, 1988]." 53 FR 1230 (Jan. 15, 1988). The 1988 rule provides that MMS may provide for a processing allowance greater than the two-thirds limitation if the applicant for exception to the general rule can show that "processing costs incurred in excess of the [two-thirds limitation] were reasonable, actual, and necessary. An application for exception shall contain all relevant and supporting documentation." 30 CFR 206.158(c)(3) (1989). Comments published with the rule at 53 FR 1266, 1267 (Jan. 15, 1988) establish that MMS contemplated that such applications would be handled on a case-by-case basis, and eschewed further rulemaking to define more specific standards for such cases. Exxon has submitted documentation to support its claim for an increased allowance. Nonetheless, we must conclude that MMS correctly found that a consistent course of administration establishes that the earlier rules published in 1986 govern production occurring before March 1, 1988.

[1] Where a settled course of behavior has been established by an administrative agency, it should continue unless a reasoned change in the course of official conduct is provided. See Motor Vehicle Mfrs. Assn. v. State Farm Mutual, 463 U.S. 29, 57 (1983). Beginning with the decision in BWAB Incorporated, 108 IBLA 250, 257, 260 (1989), we have consistently applied the 1986 regulations limiting a production allowance to two-thirds of product value on gas production occurring before March 1, 1988. See Ladd Petroleum Corp., 127 IBLA 163, 169 (1993) and cases cited therein. To allow Exxon the benefit of the rule as amended in 1988 would amount to a waiver of the prior, more stringent rule, something that was denied to competing firms over the past five years. See, e.g. Apache Corp. 127 IBLA 125, 128, 131 (1993) and cases cited. While Exxon argues that such a waiver is warranted in this case, it has not shown a reason for a change from our past refusal to allow the amended rule to be applied without regard to whether gas production sought to be excepted from the two-thirds rule occurred after March 1, 1988. Under the circumstances, we will conform to our past practice in this area, and must therefore deny the request to apply the 1988 manufacturing allowance rule to Exxon's 1987 production.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge